



EMPLOYMENT TRIBUNALS

Claimant: Mr D Boyd

Respondent: Lidl Great Britain Limited

Heard at: Reading **On: 14, 15, and 16 December 2020**

Before: Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: In Person
For the Respondent: Miss G Roberts

REASONS

[Reasons for judgment sent to the parties on the 7 January 2021 provided at the request of the claimant.]

1. In a claim form presented on 4 June 2021 the claimant made complaints of direct race discrimination and harassment related to race. The issues to be decided in the case were set out in the record of a preliminary hearing dated 7 February 2020.
2. The claimant was employed by a security company, Emsec. Emsec were contracted by the respondent to provide security at the respondent's store at Towcester Road. The duty manager at the store was Mr Aaron Cropp, the claimant alleged that he regularly referred to him as "Blacky Chan" and also called him "Charcoal". The claimant alleged that Mr Cropp's comments were made regularly throughout the period which the claimant worked at the store starting in about October 2017 and ending with a comment on 5 March 2019 which was the last day on which the claimant worked at the store.
3. The respondent's defence is that the claim is out of time, the employment tribunal does not have jurisdiction to hear the complaint, and the allegations of racist behaviour are denied.
4. Section 41 Equality Act 2020 provides that a principal must not discriminate against a contract worker as to the terms on which the principal allows the worker to do contract work by subjecting the worker to detriment. A principal must not, in relation to contract work, harass a contract worker. A "principal" is a person who makes contract work

available for an individual who is employed by another person, and supplied by that other person in furtherance of a contract to which the principal is a party. A “contract worker” is an individual supplied to a principal in furtherance of such a contract.

5. An employer must not discriminate against an employee by dismissing him or subjecting him to any other detriment. An employer discriminates against an employee if because of his race he treats the employee less favourably than he treats or would treat others. Race includes colour, nationality ethnic or national origins. Where the employee seeks to compare his treatment with that of another employee there must be no material difference between the circumstances relating to each case.
6. If there are facts from which the employment tribunal could decide, in the absence of any other explanation that the employer contravened the provision concerned the employment tribunal must hold that the contravention occurred. However, this does not apply if the employer shows that it did not contravene the provision.
7. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether conduct has the effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B; the perception of B, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect must each be taken into account.
8. Employment Tribunal proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period; failure to do something is to be treated as occurring when the person in question decided on it.
9. The contested facts in this case are as follows:
10. The claimant contended that in October 2017 Mr Cropp on the staff headset announced, “everyone Daley has caught 4 shoplifters today and from now on we call him Blacky Chan”. The claimant goes on to say that he reported this to Mr Chris Hickling, the store manager, the next day and was told that he would sort it out but nothing was done and Mr Cropp continued to refer to the claimant as Blacky Chan. Mr Cropp agreed that he referred to the claimant as Blacky Chan adding that the claimant referred to him as Whitey Chan. Mr Cropp explains how these ‘nicknames’ came to be acquired by the claimant and himself after chasing a shop lifter who pulled a needle on them, they had both jumped back and went into a martial arts stance à la Jackie Chan the movie star and martial artist. The claimant denies this version of events. Mr Cropp does not date this event.

11. The claimant says that in December 2017 at the staff store's Christmas party Mr Cropp asked him "What your drinking?" When the claimant said he was drinking brandy and coke Mr Cropp said "of course you are Blacky Chan" and burst out laughing". Mr Cropp denied this occurred, Mr Joel Beardmore who the claimant stated witnesses this incident denied that it happened. Also at the Christmas party the Claimant says that he gave Mr Cropp a cigarette and as he did that Mr Cropp referred to the claimant as "Charcoal" . Mr Cropp denied that this occurred and Mr Beardmore who was said by the claimant to have witnessed the incident also denied that it occurred. Mr David Buffham who was also present at the Christmas party is said by the claimant to have said that the comment was "just banter". When this was put to him by the claimant Mr Buffham denied that it occurred.
12. Mr Hickling contends that there was an occasion when Mr Cropp referred to the claimant as Blacky Chan over the radio headset. This was in the summer of 2018. Mr Hickling called the claimant and Mr Cropp into his office and asked them about this. He was told by both Mr Cropp and the claimant that "it was not racism" they were nicknames that they had for each other "Blacky Chan" and "Whitey Chan". Mr Hickling told Mr Cropp and the claimant that they were not to refer to each other in such terms on the radio headset as they could cause offence by doing so. Mr Hickling spoke to the claimant alone and was reassured that there was no reason for concern. Mr Cropp agreed with the evidence given by Mr Hickling. The claimant denied the evidence insisting that the meeting did not take place.
13. In June, July and August 2018 Amelia Langdon worked in the store. On one occasion she heard the claimant referred to as Blacky Chan by Mr Cropp, she said that everyone could hear it on the radio headset.
14. Issues arose relating to the claimant's completion of his time sheets and his attendance, as a result, at the respondent's request, the claimant stopped working at the Towcester Road store and was sent to worker at other locations by Emsec. This was in about the autumn of 2018.
15. The claimant and the respondent disagree about the frequency of the claimant working at the Towcester Road store in 2019, the claimant states that he worked there frequently, the respondent contends that the claimant only worked there on exceptional occasions such as when providing cover for another security person. We prefer the respondent's evidence on this issue.
16. The claimant's account is that he was called Blacky Chan by Mr Cropp throughout 2018 and that he complained about it to his Manager at Emsec, Mr Colin Harper, who said he would speak to Mr Cropp about this is. The claimant refers to a meeting between Mr Cropp and Mr Harper on 5 March 2019 when he believed that they discussed the claimant's complaint. This was denied by Mr Cropp who said that he had only met Mr Harper on one or two occasions but had never had any discussion with him. The claimant

did not give evidence of any feedback from Mr Harper on how he dealt with the claimant's complaint.

17. In April 2019 the claimant was sent to work in Leicester and Bedford, it was then that the claimant complained to managers there about discrimination, it was around this time that the claimant was suspended by Emsec.

Conclusions

18. Calling a black person "Blacky" is likely to offend, for the claimant to have been offended and upset that he was referred to as Blacky Chan is a credible statement. While the claimant says he was offended the respondent's case is that he was not offended.
19. Mr Cropp states that he enjoyed a good relationship with the claimant which enabled him and the claimant to refer to each other as Blacky Chan and Whitey Chan. The evidence of the claimant and Mr Cropp does not suggest a level of intimacy that would allow us to consider that there was between them the type relationship where the claimant and Mr Cropp are likely to refer to each other in terms which might be objectively considered as racist but just banter between them. Mr Hickling's evidence indicates that his immediate reaction when he heard the claimant referred to as Blacky Chan by Mr Cropp was to question it and then to ask that it stop.
20. Although Mr Cropp admits that he referred to the claimant as Blacky Chan "*to his face and over the headset till Chris Hickling spoke to him in the office about it*": None of the respondent's witnesses, apart from Mr Hickling, admit to ever having heard the claimant referred to as Blacky Chan, this was openly used as a description of the claimant for a period of time on the admission of Mr Cropp.
21. There was evidence from Ms Langdon that she heard the claimant referred to as Blacky Chan and in an SMS message between the claimant and Emily Jane Snowden, EJS confirms that she heard the claimant referred to as Blacky Chan.
22. Mr Cropp and Mr Hickling say that the claimant called Mr Cropp Whitey Chan and that this was done openly and as a joke between them. However, nobody heard the claimant call Mr Cropp Whitey Chan, even Mr Hickling accepted that he never heard the claimant using this nickname for Mr Cropp, he says that the claimant admitted to him that he did so. The claimant denies it.
23. Although the claimant says that he complained about it over a period of time it is notable that the claimant did not make any written complaint about being called Blackey Chan by Mr Cropp until after his relationship with his employer and the respondent had imploded when the claimant was accused of dishonesty in relation to his time sheets.

24. The Tribunal consider that it is more likely than not that the claimant did not call Mr Cropp Whitey Chan.
25. The Tribunal consider that it is more likely than not that the claimant did not consider the use of the nickname Blackey Chan by Mr Cropp, when referring to him over the staff radio headset, to be playful banter which was not offensive. The Tribunal accept that the claimant was upset and offended by it.
26. We have considered over what period time did the Mr Cropp refer to the claimant as Blackey Chan. The claimant says that it was over a period 17 months from about October 2017. The claimant alleged that he was called Blackey Chan at the Christmas Party in 2017. This was not supported by any of the witnesses who gave evidence before us who were present at the party. We see no reason why they would tell truth about what they saw and heard.
27. Bearing in mind the evidence of Ms Langdon and Mr Hickling and the fact that the claimant stopped working regularly at the Towcester Store after September 2018 it is in our view that the claimant was being called Blackey Chan in the summer 2018. This came to an end after Mr Hickling said it must stop in the summer of 2018. The window in which it is likely that the claimant was referred to as Blackey Chan was from about May 2018 until around the end of August 2018.
28. We note that the claimant resigned his employment with Emsec in about May 2018. He did this because he was offered employment by his former employer Aspro at a better rate of pay. The claimant was then offered a job with Emsec at improved rate of pay and promoted to Store detective. The claimant therefore continued in his employment with the respondent. At about this time when the claimant was motivated to leave Emsec it was because he wanted more pay, he stayed because he was offered more pay. We take this into account in consideration of the effect and impact that being called Blackey Chan had on the claimant, it was not something over which he considered resigning his employment.
29. The respondent's evidence is that the claimant stopped working regularly at the Towcester Road store from later part of 2018. The claimant 's evidence was that he continued to work there every Saturday until April 2019. We prefer the respondent's evidence on this point. We consider that it is not proven that there was any reference to the claimant as Blackey Chan after the end of August 2018.
30. The claimant was in our view referred to as Blackey Chan, on occasions, by Mr Cropp for some of the period from around May 2018 until about August 2018.

Extension of time

31. We consider that it is just and equitable to extend time for the presentation of complaints, we come to this conclusion because both parties have been able to engage in the case notwithstanding the delay and appear to have been able to present their cases without any significant prejudice caused by the delay.
32. We are satisfied that the claimant is a contractor worker for the purposes of section 41. The claimant's claim of direct discrimination and harassment related to race succeeds.

Compensation

33. In respect of injury to feelings we have in mind the Vento Guidelines as amended.
34. The Tribunal note that the claimant did not raise any complaints about being referred to as Blackey Chan and note that Mr Hickling offered the claimant the opportunity to complain about the conduct of Mr Cropp and he did not take this up. The claimant considered leaving the employment with Emsec, which would have resulted in him getting away from the Towcester Road store if he was seriously concerned about or affected by the conduct of Mr Cropp. We note that the claimant was upset and offended by the conduct of Mr Cropp. The Tribunal consider that the conduct of Mr Cropp ceased after August 2018 and occurred in the period from about May 2018. We do not consider that the comments were made as regularly as the claimant suggested but did occur on a number of occasions. In the circumstances we consider that an award in the lower band of the Vento Guidelines is appropriate and make an award of £6,500. The claimant is also entitled to recover interest on the award at the rate of 8% in respect of the period from 3 June 2019 until 16 December 2020 and we award interest in the sum of £799.23.

Employment Judge Gumbiti-Zimuto

Date: 16 March
2021

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Sent to the parties on:
J Moossavi

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For the Tribunals Office

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